UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUFUS EARL DAVIS, Petitioner and Appellant, vs. WALTER DUNBAR, LAWRENCE E. WILSON, and THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents and Appellees.	)	No. 21783

APPELLEE'S BRIEF

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JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with having violated Penal Code section 217, assault with intent to commit murder, on or about February 20, 1964 (CT 1).[1/]

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1. "CT" refers to Clerk's Transcript of the Los Angeles Superior Court.

In count two, he was charged with having violated Penal Code section 220, assault with intent to commit rape, on or about February 20, 1964. Appellant entered a plea of not guilty. Appellant personally and all counsel waived a jury trial. Appellant was found guilty of assault with a deadly weapon, a lesser included offense within that charged in count one. He was found not guilty of count two. Appellant's motion for a new trial was denied. Probation was denied. Appellant was sentenced to the state prison for the term prescribed by law (CT 15, 16). Appellant filed a notice of appeal from the judgment and order denying his motion for a new trial. The California Court of Appeal, Second Appellate District, Los Angeles, California, affirmed the judgment on July 6, 1965, in an unpublished opinion, a copy of which was marked "Exhibit B" in respondent's return to the order to show cause.

Petitioner sought a hearing in the California Supreme Court and said petition was denied on September 2, 1965. People v. Davis, Case No. 10385. Petitioner sought a review in the Supreme Court of the United States and his petition for a writ of certiorari was denied on January 17, 1966. Davis v. Dunbar, No. 681, Miscellaneous, October Term, 1965.

Petitioner next sought habeas corpus in the California appellate courts. Said petitions were denied

without opinions by the Court of Appeals on February 5, 1966 (In re Davis, Crim. No. 4944) and by the California Supreme Court on March 9, 1966 (Davis vs. Dunbar, Case No. 9814). See "Exhibit C."

Petitioner's direct appeal to the California courts was limited to the sole question of whether the trial court had erred in receiving into evidence statements made by him after his arrest.

B. Proceedings in the federal courts

On November 1, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. On November 1, 1966, an order to show cause was issued, and on December 9, 1966, appellee, respondent below, filed a return to the order to show cause and points and authorities in opposition to habeas corpus. On or about December 21, 1966, appellant filed a traverse.

On March 8, 1967, Judge Zirpoli of the District Court filed his order denying the writ.

On March 10, 1967, appellant filed a notice of appeal, and on April 6, 1967, Judge Zirpoli granted leave to proceed in forma pauperis and issued a certificate of probable cause.

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STATEMENT OF THE FACTS

The evidence supporting the charge of assault with a deadly weapon to which petitioner was found guilty in the Superior Court of Los Angeles County is set forth in the reporter's transcript of the trial, a copy of which was introduced in evidence at the hearing before Judge Zirpoli (certificate of clerk to record on appeal).

A. People's case

Hazel Eden, who was 79 years old, testified that a few days prior to February 20, 1964, she rented a room to appellant. On that date, appellant threw her on the floor as she came out of the bathroom that she shared with him. Appellant said: "I am going to like it here, I think I will stay." While on the floor, appellant wrestled with her. He tried to get under and unfasten her clothing. The hooks and eyes were torn off her skirt. A sleeve on her blouse was ripped. Appellant rubbed up against her with his private parts. Eden screamed and hollered. She was unable to recall what occurred subsequently because she lost consciousness. She stated that there was no one else in her house when the foregoing events occurred (RT 96-100, 119, 126, 134).[2/]

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2. "RT" refers to Reporter's Transcript of the Los Angeles Superior Court.

William Phelps, a police officer with the City of Los Angeles, testified that on February 20, 1964, he received a radio call to investigate a crime at 4309 Burns Avenue. When he arrived at 8:40 p.m., Mr. and Mrs. Castro gave him a key to the east front door of a duplex (RT 6-8). He opened the door which was secured by a night chain part way. He noticed appellant lying face down on a bed. Someone was staggering back and forth in the bathroom (RT 9-10).

Phelps forced the door open. Mrs. Eden, who was staggering and moaning incoherently, had a deep cut on top of her head. There were red, bloodlike stains all over her person, in the hallway near the bathroom and on the floor of appellant's bedroom. There was broken glass covered with a bloodlike stain strewn about the hallway. Appellant appeared to be unconscious and was lying on the bed. There was no odor of alcohol on his person (RT 11-13, 17, 31, 54-56).

A chair was turned over in the bedroom. There was a bloodstained crumpled rug in the bathroom. (RT 22). On the floor of appellant's bedroom, Phelps recovered a razor blade (RT 14).

There were marks on appellant's chest and face resembling scratch marks. On his left wrist, there was a two-inch cut that looked as if it was caused by a knife.

On appellant's left forearm there was a circular mark that looked like a bite mark. Appellant had on trousers but no shirt, shoes or socks. There was a deep red damp stain on his trousers. En route to the police station, appellant who was handcuffed was asked what had happened. He did not reply. Appellant who by this time appeared to be conscious moved his head around and his eyes were open (RT 14, 18-21, 46).

Dr. Roscoe Webb examined appellant and Mrs. Eden on February 20, 1964 (RT 70-71, 80). Webb found no evidence demonstrating that appellant had been forced into a state of unconsciousness. The scratches on appellant's chest and face appeared to have been caused by fingernails. The superficial laceration on appellant's left wrist was caused by a razor blade (RT 75, 77-78). Webb asserted that the amount of blood on a blanket on appellant's bed could not have come from the wound on his arm (RT 27-28, 94).

Mrs. Eden was in a state of severe shock. A piece of scalp one inch square was missing from the top of her head. The jagged deep laceration on her forehead could have been caused by a bottle. It appears that Mrs. Eden had been struck twice. There was a large bruised area on her neck that could only have been produced by considerable pressure. She had a severely contused black

left eye and a lesser contusion of the right eye. Her cheek was superficially lacerated (RT 72-74, 83-84). Mrs. Eden was covered with blood and was bleeding from the scalp wound (RT 78). Dr. Webb concluded that Mrs. Eden, whose condition was critical, had less than a fifty per cent chance of survival (RT 75).

B. Defense testimony

Appellant testified on direct examination that on February 20, 1964, he worked until noon. After work, he went to Hollywood returning to the room he had rented from Mrs. Eden between 5:00 and 6:00 p.m. He did not see Mrs. Eden before he went into his room (RT 163-64, 168). After he took a shower, Mrs. Eden came to the door and he asked her for hot water for tea. While waiting for Mrs. Eden to return, appellant laid down on the bed. Appellant also testified that the first time he saw Mrs. Eden was before he took a shower.

Upon hearing a knock on the door, appellant opened it and observed a Mexican and a Negro who had a gun. The Negro said, "Be quiet and you won't get hurt." (RT 169, 199, 206). The Mexican put a knife to appellant's neck. After the Negro went towards the bathroom, appellant heard Mrs. Eden scream. Appellant hit the Mexican and ran into Mrs. Eden's room looking for a telephone which he did not find. He then ran into the

kitchen looking for a weapon (RT 200-01).

Both men came into the kitchen and took him back into his bedroom. The Negro went back to the bathroom. Appellant had a fight with the Mexican in which his wrist was cut. As the Negro came back to appellant's room, appellant threw two bottles at him (RT 202-03).

Appellant testified:

> "They both came back in there and that is when they beat me, one of them, the Mexican guy. He was up by this time after we had wrestled and both of them came in and shoved me back over toward the bed and they hit me with something that was wrapped with something I don't know what it was. It looked like a piece of rubber. I couldn't identify it it happened so quick." (RT 204:1-7).

Appellant remembered waking either at the police station or at the hospital (RT 209). He denied striking or attempting to rape Mrs. Eden (RT 207). Appellant said that he had a conversation with Officer Tubbs in the jail on February 21, 1964, in which he denied having anything to do with beating Mrs. Eden (RT 212).

On cross-examination appellant testified that he was scratched on the chest and arm while "rassling"

with the Mexican (RT 214). Appellant was asked, "You knocked the arm holding the knife away from your neck?" He answered in the affirmative. Appellant stated that he then knocked the Mexican down with his hand (RT 219-21). He ran to Mrs. Eden's room and from there to the kitchen. After the Mexican and the Negro took appellant back to his room, the Negro hit him with a piece of rubber hose. Appellant lost consciousness after one blow (RT 222-23).

Appellant described the Negro as weighing 160 or 170 pounds, 5'7" to 6' in height, medium complexioned, short hair, wearing gray khakis and a blue shirt. He described the Mexican as 5' to 5'6" in height, black hair, 150 pounds, wearing a pair of pants and a shirt. In answer to a question asking the age of the men, appellant said that both were in the middle twenties (RT 227-29).

C. Rebuttal testimony

Jesse Tubbs, a police officer with the City of Los Angeles, testified that he had a conversation with appellant on February 22, 1964, at the main jail. Appellant told him that the first time he saw the two men was after he came in from outdoors and observed them assaulting Mrs. Eden as he walked down the hallway. Appellant stated that he did not know how he received the cut in his wrist. He also said that one of the men was Oriental (RT 251-52,

255-56).

John Nechak, a police officer with the City of Los Angeles, testified that he had a conversation with appellant on February 20, 1964, at the Hollywood Receiving Hospital (RT 278-79). He related what appellant said as follows:

> "'I worked for Doctor Robert Herman, 825 Cahuenga Boulevard, from 8:00 a.m. to 11:00 a.m. He has got a pet hospital there. I went home from there and stayed there at home until the police brought me here to the hospital. I only left the room where I live once from the time I came home from work until they brought me here. That was only for about five minutes when I went across the street to get a soda. After I got the soda I went back to the room and went to bed. That was about 7:00 p.m. While I was in bed I heard Miss Eden scream so I got up and started to go into her room through the hall. When I got to the hall I saw two men. One was a Negro and the other one was Oriental. The Negro was in his early twenties, about five feet ten inches, weighed about 150 to 165 pounds. He had black hair and was wearing a pullover blue sweater and

khaki pants. He had a silver revolver about medium size in his hand. The other guy was an Oriental about 25, four feet nine or ten inches, medium build, black hair. He was wearing a white sweater-shirt and khaki pants. They were both in the hall grabbing Miss Eden and when they saw me they chased me into my room. I grabbed a Dr. Pepper bottle and tried to get out the other door and the Oriental grabbed me and hit me over the head with the gun. That is all I remember. I don't know how my wrist got cut or how I got those scratches on my face and chest. I don't know about that mark on my arm either. I lived at that place about a week and never went into Mrs. Eden's room. I have never been in that room so you won't find no fingerprints of mine there. I heard Mrs. Eden in her room today but didn't see her until after she screamed.'" (RT 279-81).

The only contention raised by appellant on direct appeal of his conviction to the California Court of Appeal was that the trial court had erred in receiving into evidence statements made by him after his arrest since he had not been informed of his right to counsel or of his right to remain silent. (See "Exh. B"). The

facts, however, show that in the prosecution's case in chief no evidence of any statement by defendant was offered in evidence. During the direct examination of defendant, he said that while he was in jail he had a conversation with Officer Tubbs, wherein he told the officer what he (defendant) had said in court. A part of the defendant's testimony on direct examination was to the effect that while he was lying on the bed in his room, he heard a knock on the front door of the apartment, and when he opened the door, two men, a Negro and a Mexican came into the house - the Mexican, who had a knife, fought with defendant and cut him on the wrist; and the Negro, who had a gun went into the bathroom, then defendant heard Mrs. Eden scream (RT 169, 199, 200-229).

As a rebuttal witness, Officer Tubbs testified that in a conversation with defendant in the jail two days after his arrest, the defendant said that he first saw the two men assaulting Mrs. Eden when he (defendant) came into the apartment from outside, and that he did not know how he got cut on the wrist (RT 251-252, 255-256).

Officer Nechak, also was called as a rebuttal witness and testified to the effect that in a conversation with defendant at the hospital on the day of the arrest, the defendant said that while he was in bed he heard Mrs. Eden scream, then he went into the hall, where he saw two

men who were grabbing Mrs. Eden; but the men chased him into his room and one of them hit him on the head with a gun, but defendant did not know how he got cut on the wrist (RT 278-279).

It thus appears that the three different versions of the occurrences in the apartment (the version of the defendant as a witness, and his versions in the two conversations with the officers) were exculpatory - there was no admission or confession therein.

The record, therefore, discloses that the prosecution refrained from offering in evidence any statement of defendant in its case in chief. The defendant under direct examination, however, made exculpatory statements to the effect that while he was in the house after he had opened the front door in response to a knock thereon, two men entered the house and fought him and Mrs. Eden. In view of such testimony, the prosecution was justified in presenting, on rebuttal for impeachment purposes, evidence of exculpatory statements of defendant which were different from defendant's testimony on direct examination. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960).

APPELLANT'S CONTENTIONS

1. Incriminating statements obtained from appellant while appellant was without counsel were introduced at his trial in violation of the rule in Escobedo v.

Illinois, 378 U.S. 478 (1964).

2. Evidence obtained by an illegal search and seizure was introduced against him at trial.

3. The state failed to provide compulsory process to compel the attendence of witnesses.

4. Appellant was denied effective aid of counsel on appeal.

5. Appellant was convicted of a crime not charged in the indictment.

SUMMARY OF RESPONDENT'S ARGUMENT

I. The statement made by appellant was properly admitted into evidence.

II. The gun was properly admitted into evidence without objection.

III. Appellant was not denied the use of compulsory process.

IV. Appellant has failed to exhaust available state remedies with respect to the issue of inadequate counsel on appeal.

V. Assault with a deadly weapon is a lesser included offense of assault with a deadly weapon with intent to commit murder.

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ARGUMENT

I

THE STATEMENTS MADE BY APPELLANT WERE PROPERLY ADMITTED INTO EVIDENCE

Appellant asserts that the statements obtained from him after his arrest were in violation of his right to counsel as enunciated in Escobedo v. Illinois, 378 U.S. 478 (1964). One statement was introduced, in part, on appellant's direct examination. The rest of the statements came in during the cross-examination of appellant and as part of the prosecution's case in rebuttal (RT 212, 235-242, 255-256, 278-281).

As Judge Zirpoli stated in his order denying the petition it is significant that the statements which were introduced were in and of themselves probably exculpatory rather than incriminating. Just as he did during the trial in his conversation with the police, appellant denied his guilt maintaining that he and Mrs. Eden were victimized by two assailants.

As pointed out by Judge Zirpoli these statements did not come in as part of the prosecution's case in chief. Rather, they came in only after appellant had testified on direct examination in a way somewhat different from the statements given to the police.

The policy that prevents as a prophylactic

measure use of evidence obtained in violation of law must in the instant case give way to the policy that demands the truth from a witness. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960). Also see Walder v. United States, 347 U.S. 62 (1954). And Mallory v. United States, 354 U.S. 449, 453 (1957).

Judge Zirpoli's rationale that since petitioner's trial commenced on June 16, 1964, prior to the June 22, 1964 effective date for the prospective application of the Escobedo doctrine, appellant's contention in this regard must also fail (Johnson v. New Jersey, 384 U.S. 719 (1966)) would seem to be completely dispositve of this issue.

II

THE GUN WAS PROPERLY ADMITTED INTO EVIDENCE WITHOUT OBJECTION

Petitioner argued that a gun introduced in evidence at his trial was found in his room three days after his arrest after a search without a warrant and that this violated his constitutional rights to be free from unreasonable search and seizure. Judge Zirpoli held however that the trial transcript lodged with the court showed that petitioner's counsel deliberately waived any objection to the introduction of the gun. Judge Zirpoli recited the record of the trial at page 277 as follows:

"MR. GOLDMAN [the prosecutor]: May the

gun be received in evidence, your Honor, so I can leave it with the Clerk?

"THE COURT: Well, if there is no objection I suppose you can.

"MR. NUNGESSER [petitioner's counsel]: I have no objection.

"THE COURT: It will be received in evidence." (RT 277).

The court was satisfied that the above-quoted portion of the record established a deliberate bypass of the state's contemporaneous objection rule sufficient to satisfy the standard to be applied on review by federal habeas corpus and cited Henry v. Mississippi, 379 U.S. 443 (1965) and Nelson v. People of the State of California, 346 F.2d 73 (9th Cir. 1965).

III

APPELLANT WAS NOT DENIED THE USE OF COMPULSORY PROCESS

Appellant next contended that he was denied the use of compulsory process to obtain the attendance of certain witnesses, when the district attorney allegedly dismissed these witnesses when he learned that their testimony would be in favor of appellant and that he further did not inform appellant's attorney of this until after trial. Judge Zirpoli held that the answer to this

contention was two-fold. First, the record indicated that there were no secrets with respect to the Castros, since an interpreter was sworn for the purpose of translating their testimony from Spanish, in the presence of appellant and another attorney from the same firm representing appellant at the pre-trial hearing. There is no requirement on the part of the prosecution to see that opposing counsel has properly prepared every facit of his case. Secondly, the record showed that at the arraignment for judgment, appellant's counsel moved for a new trial on all statutory grounds and indicated that he had been unable to locate the Castros. The court then gave appellant an opportunity for a continuance to try to locate the Castros, after which appellant consulted with his counsel and counsel informed the court that appellant would prefer to be sentenced at that time. The record thus amply showed that appellant and his counsel were given ample opportunity to obtain the presence of witness by compulsory process (RT 288:9-26; 289:1-26).

IV

APPELLANT HAS FAILED TO EXHAUST AVAILABLE STATE REMEDIES WITH RESPECT TO THE ISSUE OF INADEQUATE COUNSEL ON APPEAL

Appellant contends that his counsel on appeal was inadequate, since his attorney did not orally present appellant's argument to the Court of Appeal for its

consideration. Judge Zirpoli held that a review of the record, however, indicated that this contention has not been presented to the state courts and thus appellant had failed to exhaust available state remedies with respect to this question. 28 U.S.C. § 2254. It should also be noted that appellant was represented by counsel on appeal as evidenced by the record herein and that appellant's counsel on appeal did file a brief with the Court of Appeal raising those legal issues which in his opinion he assumed had merit. It is not necessary in California state courts for either the appellant or the appellee to present oral argument in addition to the briefs; and, therefore, it would seem that this contention is fully without merit even if petitioner had exhausted his available state remedies.

V

ASSAULT WITH A DEADLY WEAPON IS A LESSER INCLUDED OFFENSE OF ASSAULT WITH A DEADLY WEAPON WITH INTENT TO COMMIT MURDER

Appellant was charged with violations of Penal Code section 217, assault with a deadly weapon with intent to commit murder and California Penal Code section 220, assault with intent to commit rape. Appellant was convicted of a violation of California Penal Code section 245, assault with a deadly weapon (CT 1, 14).

Judge Zirpoli held, correctly so, that

California law allows conviction for a lesser included offense (Cal. Pen. Code § 1159) and that assault with a deadly weapon is clearly a lesser included offense of assault with a deadly weapon with intent to commit murder. People v. Greer, 30 Cal.2d 589, 596 (1947). Since no federal question is raised by such an interpretation of state law this is not a proper issue in this petition.

CONCLUSION

There being no merit in appellant's contentions, we respectfully request that the order denying the writ be affirmed.

Dated: May 25, 1967

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: May 25, 1967

Jerome C. Utz

JEROME C. UTZ
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